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No. 795

In the Supreme Court of the United States

OCTOBER TERM, 1943

THOMAS H. O'NEAL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

No opinion was rendered by the District Court. The opinion of the United States Circuit Court of Appeals for the Sixth Circuit (R. 36–44) is not yet officially reported.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Sixth Circuit was entered on February 11, 1944 (R. 35). The petition for a writ of certiorari was filed in this Court on March 16, 1944. Jurisdiction of this Court

is invoked under Section 240 (a) of the Judicial Code as amended by the Act of Februrary 13, 1925.

QUESTIONS PRESENTED

1. Whether the Emergency Price Control Act of 1942 involves an unconstitutional delegation of authority to control prices.

2. Whether the Second War Powers Act constitutes a ratification of the Revised Tire Regulation herein involved; or whether, in any event, the grant of authority to ration involves an unconstitutional delegation of power to the President.

3. Whether the authority to ration tires was validly vested in the Office of Price Administration.

STATUTES AND REGULATIONS INVOLVED

The case involves the Emergency Price Control Act of 1942 (Act of January 30, 1942, 56 Stat. 23, 50 U. S. C. App. (Supp. II) Sec. 901 et seq.), and the Act of June 28, 1940 (54 Stat. 676), as amended by the Act of May 31, 1941 (Priorities and Allocations Act) (55 Stat. 236), and by Title III of the Second War Powers Act, 1942 (56 Stat. 176, 50 U. S. C. App. (Supp. II), Sec. 631 et seq.)

1. Price Control.—Section 205 (b) of the Emergency Price Control Act makes it a crime to violate willfully any provision of Section 4 of the Act. Subsection (a) of Section 4 makes it

unlawful to violate any price schedule effective in accordance with the provisions of Section 206. Section 206 provides (56 Stat. 35–36):

> Any price schedule establishing a maximum price or maximum prices, issued by the Administrator of the Office of Price Administration or the Administrator of the Office of Price Administration and Civilian Supply, prior to the date upon which the Administrator provided for by section 201 of this Act takes office, shall, from such date, have the same effect as if issued under section 2 of this Act until such price schedule is superseded by action taken pursuant to such section 2. Such price schedules shall be consistent with the standards contained in section 2 and the limitations contained in section 3 of this Act, and shall be subject to protest and review as provided in section 203 and section 204 of this Act. All such price schedules shall be reprinted in the Federal Register within ten days after the date upon which such Administrator takes office.

Revised Price Schedule No. 66 (7 Fed. Reg. 252–57), involved in count three herein, covering retreaded and recapped rubber tires, was issued on January 10, 1942, effective January 19, 1942. After the Price Administrator took office on February 11, 1942 (7 Fed. Reg. 1201), the Price Schedule was republished (February 21, 1942) (7 Fed. Reg. 1333), as directed by section 206, *supra*.

2. Rationing.—Section 2 (a) (2) of the Second War Powers Act, March 27, 1942, reenacted the following provision of the Priorities and Allocations Act, with the addition of the italicized words (56 Stat. 178; *cf.* 55 Stat. 236):

> * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material *or of any facilities* for defense or for private account or for export, the President may allocate such material *or facilities* in such manner, *upon such conditions* and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense. [Italics supplied.]

Section 2 (a) (8) of the same Act gave the President express authority to exercise the above-named power "through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe." (56 Stat. 180.)

No criminal sanction had been provided by the Priorities and Allocations Act. This was supplied by Section 2 (a) (5) of the Second War Powers Act, which reads (56 Stat. 179):

> Any person who willfully performs any act prohibited, or willfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, *whether heretofore or hereafter issued,* shall be guilty of a mis-

> demeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both. [Italics supplied.]

Section 201 (b) of the Price Control Act provides in part (56 Stat. 29):

> * * * The President is authorized * * * to transfer to the Office of Price Administration any of the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the Government with respect to any particular commodity or commodities * * *.

On August 28, 1941, by Executive Order No. 8875 (6 Fed. Reg. 4483), the President had authorized the Office of Production Management to perform the allocation functions established by the provisions quoted above. These functions were transferred by the President from the Office of Production Management to its successor, the War Production Board, by Executive Order No. 9040 on January 24, 1942 (7 Fed. Reg. 527), and that agency, on the same day, delegated general authority to exercise rationing control, at the retail level, to the Office of Price Administration by Directive No. 1 (7 Fed. Reg. 562), which was approved and countersigned by the President.[1]

[1] Supplementary Directive No. 1B (7 Fed. Reg. 925), issued on February 9, 1942, expressly extended this authority to "retreaded or recapped tires," subject to "the terms and conditions specified in said Directive No. 1."

The latter agency was expressly authorized by Section 201 (b) of the Emergency Price Control Act of 1942, 50 U. S. C. App. (Supp. II) 921 (b), to receive a transfer of "the powers and functions relating to priorities or rationing conferred by law upon any other department or agency of the government with respect to any particular commodity or commodities". These transfers preceded the enactment of the Second War Powers Act, *supra,* on March 27, 1942.

The Office of Production Management first exercised the allocation power with respect to tires through Supplementary Order M–15–c (6 Fed. Reg. 6792), dated December 27, 1941, which froze the sale of tires and tubes until the issuance of appropriate rationing regulations and designated the Office of Price Administration to administer and grant exceptions to the Order. This Order was approved and countersigned by the President.

The tire rationing regulations on which counts one and two are based were issued by the Office of Price Administration on February 11, 1942, effective as of February 19, 1942 (7 Fed. Reg. 1027–45). They generally prohibited both the purchase and sale of new and recapped rubber tires and tubes except where an appropriate certificate of eligibility is obtained by the purchaser from the local rationing board and transferred to the seller.

After the enactment, on March 27, 1942, of the Second War Powers Act, on April 7, 1942, the President issued Executive Order No. 9125 (7 Fed. Reg. 2719), which contained the following statement:

> 4. War Production Board Directives No. 1 of January 24, 1942 (7 F. R. 562), No. 1A of February 2, 1942 (7 F. R. 698), No. 1B of February 9, 1942 (7 F. R. 925), No. 1C of February 28, 1942 (7 F. R. 1669), and any other authorizations of the Office of Production Management or the War Production Board with respect to priorities or rationing, *and all regulations or orders issued, or actions taken, by the Office of Price Administration or the Price Administrator pursuant to such Directives or authorizations, are hereby, until withdrawn or superseded, continued in full force and effect, as if issued pursuant to this Order or under authority conferred pursuant to this Order.* No provision of this Order shall be construed to impair the right of the Administrator to maintain pending, or to institute, civil proceedings, or to take any other action with respect to violations prior to the date of this Order of any priorities or rationing regulation or order heretofore issued. [Italics supplied.]

STATEMENT

Petitioner seeks review of a judgment of the Circuit Court of Appeals for the Sixth Circuit

which affirmed a judgment of conviction against petitioner in the District Court for the Middle District of Tennessee (R. 14–16). Petitioner, a Nashville police officer, bought and sold four new recapped passenger tires without rationing certificates in July 1942. The three counts in the criminal information filed on December 1, 1942, respectively charged him with (1) a purchase in violation of the federal tire rationing regulation (R. 10), (2) a sale in violation of the same regulation (R. 9), and (3) a sale in violation of the tire price control regulation (R. 11). There was evidence from which the jury could have found that petitioner had become fully conversant with these rationing and price control regulations in the course of an assignment to cooperate with the local Office of Price Administration enforcement staff (R. 21). The evidence further showed that petitioner bought the four tires under surreptitious circumstances for $80.00 (R. 22) and resold them for $160.00 (R. 24). The ceiling price established by Maximum Price Regulation No. 66 issued by the Office of Price Administration was approximately $10.00 each (R. 27). No attempt had been made by any of the parties to these transactions to procure the necessary rationing certificates. The petitioner was accordingly found guilty of a willful violation on all three counts. He was sentenced to serve six months on all counts, sentence to run concurrent-

ly, and fined one hundred dollars on each count. (R. 15.) Appeal was taken to the circuit court of appeals. (R. 17.)

So far as the Record discloses, petitioner for the first time in assigning error (R. 33, 34–a) raised the constitutional issues with respect to which he seeks certiorari. The Circuit Court of Appeals nevertheless passed on these questions and unanimously affirmed the judgment below (R. 35–44).

ARGUMENT

It is believed that the issues presented by this case lie in a narrower compass than that drawn by petitioner.

1. The first question upon which review is sought, concerning the delegation of authority contained in the Emergency Price Control Act for the issuance of maximum price regulations, has been resolved by the decision in *Yakus* v. *United States,* No. 374, present Term.

2. The question relating to the validity of the delegation of authority to allocate or ration under the Second War Powers Act is not squarely presented by the facts of this case. As shown *supra,* p. 6, the tire-rationing regulations here involved (in counts one and two) were issued February 11, 1942, under the Priorities and Allocations Act, and the violations charged occurred in July 1942. In the meantime the Second War Powers Act was approved, reenacting substantially the

provisions of the Priorities and Allocations Act (see pp. 4–5, *supra*). This reenactment constitutes legislative ratification of the regulation involved. *Swayne & Hoyt, Ltd.* v. *United States,* 300 U. S. 297, 300–303; *Silas Mason Co.* v. *Tax Comm'n,* 302 U. S. 186, 208; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 146–148; *Tiaco* v. *Forbes,* 228 U. S. 549, 556; *United States* v. *Heinszen & Co.,* 206 U. S. 370, 382, 384; *Prize Cases,* 2 Black 635, 671. Particularly is this true since Congress in section 2 (a)(5) of the Second War Powers Act (*supra,* p. 5) specifically provided that the criminal penalties therein established were to apply to violations of regulations "heretofore" issued. This confirmation by Congress removes any problem of original delegation of authority. Cf. *Prize Cases,* 2 Black 635, 671; *Hamilton* v. *Dillin,* 21 Wall. 73, 87–88; *Hirabayashi* v. *United States,* 320 U. S. 81, 91. Since petitioner's offense occurred after this ratification, he is in no position to challenge the regulations as they might be applied to violations prior to the Second War Powers Act.

While the decision below sustains the delegation of authority on broader grounds, there is no occasion to review the decision to settle a conflict of decisions, for the holding is in accord with the only other appellate court determination, that of the Circuit Court of Appeals for the Second

Circuit,[2] and is likewise in accord with every lower court holding.[3]

If it were necessary to consider the validity of the delegation in the present case, it is submitted that it clearly meets the requirements of the Constitution with respect to the expression by Congress of appropriate policies and standards. See, e. g., *United States* v. *Wright, infra,* note 3. Before the President may allocate, he must be satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of some material. This is not a subjective test. Cf. *Avent* v. *United States,* 266 U. S. 127, upholding a statute authorizing the Interstate Commerce Commission to promulgate such rules as in its opinion will best promote railroad service in the interest of the public. Furthermore, all allocations must be appropriate in the public interest and must promote the national defense. This degree of specificity was all that was reasonably practical under the circumstances necessitating this wartime system of material control. Cf. *McKinley* v. *United States,* 249 U. S. 397, upholding the grant of

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[2] *United States* v. *Randall,* 140 F. (2d) 70 (C. C. A. 2d).

[3] *Henderson* v. *Bryan,* 46 F. Supp. 682 (S. D. Cal.); *United States* v. *Wright,* 48 F. Supp. 687 (D. Del.); *Brown* v. *Bernstein,* 49 F. Supp. 728 (M. D. Pa.); *United States* v. *Beit Bros.,* 50 F. Supp. 590 (D. Conn.); *United States* v. *Randall,* 50 F. Supp. 139 (E. D. N. Y.); *United States* v. *Maviglia,* 52 F. Supp. 946 (D. N. J.).

power to the Secretary of War to "do everything by him deemed necessary" to stamp out prostitution around army camps; *Dakota Central Telephone Co.* v. *State of South Dakota,* 250 U. S. 163, sustaining the Joint Resolution of July 16, 1918, 40 Stat. 904, authorizing the President to take over the telephone system of the country "whenever he shall deem it necessary for the national security or defense." See also *United States* v. *Chemical Foundation, Inc.,* 272 U. S. 1.

A more restrictive delegation could not have served the needs of the country with "reasonable practicability." The task of rationing and allocation in wartime is so difficult and complex that a detailed legislative formula would defeat efficient administration. The commodities involved are of the utmost military importance. Rationing is inseparably tied in with industrial allocation and military requirements. To decide when and what to ration requiries knowledge of the size and disposition of the armed forces; losses by ship sinkings, aerial bombardments or other destruction; size of existing stockpiles of scarce materials; the possibility of replenishing such stockpiles from domestic and foreign sources and by newly developed technical processes; and the military requirements of our allies.

3. We likewise submit that there is no basis for the charge that the rationing authority was in-

validly vested in the Office of Price Administration.[4] The Second War Powers Act specifically authorized the President to exercise his powers through any Government agency. Section 2 (a) (8), *supra* p. 4. That Congress contemplated that the rationing function would be carried out by the Office of Price Administration appears in section 201 (b) of the Price Control Act enacted in January, 1942, *supra* p. 5.[5] Both supplementary Order M–15–c of the Office of Production Management and War Production Board Directive 1 conferring rationing authority on the Office of Price Administration were signed and approved by the President. After the passage of the Second War Powers Act, the President

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[4] The exercise of the President's power through the Office of Price Administration has been sustained in every case presenting the issue. *United States* v. *Randall*, *supra*; *Henderson* v. *Bryan*, *supra*; *United States* v. *Wright*, *supra*; *Brown* v. *Bernstein*, *supra*; *United States* v. *Beit Bros.*, *supra*; *United States* v. *Maviglia*, *supra*; *Perkins* v. *Brown*, 53 F. Supp. 176 (S. D. Ga.).

[5] Insofar as the President conferred rationing or allocation authority on the War Production Board by Executive Order, and the War Production Board, together with the President, transferred this power to the Office of Price Administration, rationing power conferred by law on another department or agency of the Government was thus conferred on the Office of Price Administration. (See petitioner's brief, p. 31.) Since by January 1942 the allocation power had been transferred to the War Production Board's predecessor, the Office of Production Management, the language of section 201 (b) of the Emergency Price Control Act was apt.

issued Executive Order No. 9125 approving War Production Board Directive 1 and 1B (specifically covering tire rationing), and continuing in effect all ration regulations of the Office of Price Administration issued under them. See pp. 6–7, *supra*. Petitioner's violation occurred after this series of Presidential acts.

CONCLUSION

The broad questions sought to be raised by the petition do not require decision in this case. There is no conflict of decisions. The holding below is correct. If the constitutional question urged in the petition is thought worthy of review, it is believed that review may more properly await a case in which decision must turn on that question.

Respectfully submitted.

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